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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No..... 71-391

RONALD EDWARD SHAFER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

DAVID C. GODFREY
101 South Meramec, Suite 1
Clayton, Missouri 63105
(314) 721-3383
Attorney for Petitioner

C. JOSEPH CAVANAGH
First National Bank Building
Springfield, Illinois 62701

and

THOMAS F. LONDRIGAN
916 Ridgely Building
Springfield, Illinois 62701
Of Counsel

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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Ronald Edward Shafer, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on July 12, 1971. A petition for rehearing was overruled on August 20, 1971.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is attached as Appendix A. The petition for rehearing and the order overruling said petition are attached as Appendix B and Appendix C.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on July 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit misinterpreted and wrongly applied the recent decision of the United States Supreme Court in United States v. Freed (39 U.S.L.W. 3424), in denying the constitutional issues of Petitioner's case (Appendix A, page 2).

2. Whether the provisions of the National Firearms Act of 1968 violated Petitioner's right against self-incrimination in that it required the Petitioner to incriminate himself under the criminal statutes of Illinois.

3. Whether the Petitioner's rights to due process and to a fair trial were violated by the intentional destruction by the Government of the component parts of alleged destructive devices after the Court sustained Petitioner's motions under Rule 16.

4. Whether the Petitioner was deprived of due process of law and a fair trial by the United States Court of Appeals' sanction of the trial court's complete departure from the accepted course of judicial proceedings as to evidence and instructions to the jury.

STATUTES AND RULES INVOLVED

Title 18 U.S.C., Section 922(b)(3) provides:

Section 922

(b) "It shall be unlawful for any licensed dealer . . . to sell or deliver

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (. . .) the State in which the licensee's place of business is located . . ."

Title 18 U.S.C., Section 922(b)(5) provides:

Section 922

(b) "It shall be unlawful for any licensed dealer . . . to sell or deliver

(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to Section 923 of this Chapter, the name, age and place of residence of such person if the person is an individual . . ."

Title 18 U.S.C., Section 922(d)(1) provides:

Section 922

(d) "It shall be unlawful for any . . . licensed dealer . . . to sell or otherwise dispose of any firearm to any person knowing or having reasonable cause to believe that such person—

(1) has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year."

Title 26 U.S.C., Section 5841 provides:

Section 5841

"(a) Central Registry—The Secretary or his delegate shall maintain a central registry of all firearms

in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm."

"(b) By Whom Registered—. . . Each firearm transferred shall be registered to the transferee by the transferor."

"(c) How Registered—Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each . . . transferor of a firearm shall, prior to . . . transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to . . . transfer the firearm, and such authorization shall effect the registration of the firearm required by this section."

"(e) Proof of Registration—A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary or his delegate upon request."

Title 26 U.S.C., Section 5861(d) provides:

Section 5861

"(d) It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Title 26 U.S.C., Section 5845(a) provides:

Section 5845(a)

"For the purpose of this chapter—

(a) The term firearm means . . . a destructive device . . .

(f) The term 'destructive device' means (1) any explosive, (B) grenade . . .; or (3) any combination of parts either designed or intended for use in converting any device into a destructive device, and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon . . ."

Title 26 USC, Section 5812 provides:

Section 5812

Under Section 5812, Title 26, United States Code, "a firearm may not be transferred unless: (1) the transferor has filed with the Director, Alcohol and Tobacco Tax Division (now, Alcohol, Tobacco and Firearms Tax Division, Internal Revenue Service, Treasury Department, Washington, D.C., a prescribed written application, in duplicate, for the transfer and registration of the firearm to the transferee; (2) any tax payable on the transfer is paid, as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application at least by his name and address with, in the case of an individual, his fingerprints and photograph; (4) the transferor is identified in the application at least by his name and address with, in the case of an individual, his fingerprints and photograph; (5) the firearm to be transferred is identified in the application by classification of the weapon (e.g., machine guns, short-barreled shotgun); serial number; manufacturer and importer, if any; caliber, gauge or size; and any other identifying marks; and (6) the application for transfer has been approved by the Director, Alcohol and Tobacco Tax Division, and the original thereof has been returned to the transferor.

A transfer tax of either $5.00 or $200.00 must be paid by the transferor for the transfer of any firearm, depending on the nature thereof, Payment of such tax must be evidenced by proper stamp affixed to the original application for transfer.

The term 'transfer' as used herein includes selling, assigning, pledging, leasing, loaning, giving or otherwise disposing of."

Title 26 U.S.C., Section 5861(e) provides that:

"It shall be unlawful for any person to transfer a firearm in violation of this chapter."

Chapter 38, Section 24-1, Illinois Revised Statutes (1969) provides:

(a) A person commits the offense of unlawful use of weapons when he knowingly:

(7) Sells, manufactures, purchases, possesses or carries any weapon from which more than 8 shots or bullets may be discharged by a single function of the firing device, any shotgun with a barrel less than 18 inches in length, or any bomb, bombshell, grenade, bottle or other container containing an explosive substance, such as but not limited to black power bombs and Molotov cocktails; or

. . .

a person convicted of a violation of Subsection 24-1 (a)(7) or of Subsection 24-1(a)(9) shall be imprisoned in the penitentiary from one to 5 years.

Rule 16 of the Federal Rules of Criminal Procedure provides:

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.

Upon motion of a defendant the court may order the attorney for the government to permit the defend-

ant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places.

Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C., Section 3500.

(d) Time, Place and Manner of Discovery and Inspection.

An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(g) Continuing Duty to Disclose; Failure to Comply.

If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 52 of the Federal Rules of Criminal Procedure provides:

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 51 of the Federal Rules of Criminal Procedure provides:

Exceptions to Rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his ob-

jection to the action of the court and the grounds therefor; **but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.** (Emphasis added.)

STATEMENT

Petitioner, a licensed Federal firearms dealer doing business in the State of Illinois, was charged in an eleven-count indictment with violations of the National Firearms Act of 1968.

Counts I and II charged Petitioner with sale of a pistol to a Larry Joseph Radford knowing that he was a non-resident of the State of Illinois (Count II) and knowing he was a convicted felon (Count I). The Government produced Larry Joseph Radford and a Gradoga pistol he stated he purchased from the Petitioner. The pistol was marked for identification purposes as Government's Exhibit 1 but admittedly never introduced into evidence. Further, this pistol was given to the jury for use in their deliberations. A small black box marked "Gradoga .25" also was brought into court with the gun but never used or marked or introduced by the Government, and was also given to the jury for use by them in deliberating. Larry Joseph Radford testified he was a convicted felon but this was never substantiated by the Government by records of conviction. Radford testified he told Petitioner he was living in Missouri when he first met Petitioner in December, 1968, but the Government never showed that Petitioner had knowledge that Radford did not live in Illinois two months later when the pistol was allegedly obtained from Petitioner's business establishment.

Counts III, VI charge that on December 17, 1968 and December 18, 1968, respectively, Petitioner, a licensed gun dealer, sold and delivered ten (10) grenades without not-

ing in his records the name, age and address of the purchaser.

Counts IV, VII and X charge that Petitioner transferred certain numbers of grenades, ten, ten and nine respectively, on December 17, 1968, December 18, 1968 and April 27, 1969, without paying the transfer tax on such.

Counts V, VIII and XI charge Petitioner with possession of certain numbers of grenades, ten, ten and nine respectively, on December 17, 1968, December 18, 1968 and April 27, 1969, which had not been registered to him.

Count IX was dismissed by the Government prior to trial inasmuch as it was shown that defendant, on the date charged, had not been a licensed dealer as alleged in that count.

All transactions (Counts III through XI) involved "practice" fuses, "practice" bodies and powder of unknown quantity and quality. All transactions of these counts involved two undercover agents for the Alcohol, Tobacco and Firearms Tax Division of the United States Treasury Department.

All transactions (Counts III through XI) involved the separate sale and/or possession of each of the three components needed to make what was described as a destructive device—grenade. No testimony was introduced to show that Petitioner was charged with, nor did testimony show him to have joined the three components together to make a "grenade". Admittedly, all three components—fuse, body and sufficient powder—must necessarily be joined before a destructive device existed. Any two of such would not cause a destructive device to exist.

The Government agents admitted to intermingling the twenty fuses of the purchases of December 17th and December 18th (Counts III, IV, V, VI, VII and VIII) and could not distinguish which ones were obtained from Peti-

tioner on which date. The unintroduced photographs of the practice fuses (Government's Exhibits 3 and 62) were taken prior to the Government's destruction of such fuses and were also of intermingled items testified to have been obtained from Petitioner on the two separate dates.

Petitioner was originally charged in an indictment returned on September 25, 1969, with the alleged violations of December 17, 1968, February 19, 1969 and April 27, 1969. Petitioner's motion to inspect the evidence under Rule 16 was sustained by the Court but no time and place was set by the Court for such inspection (Rule 16(d)) and no opportunity was afforded Petitioner to make such inspection. That indictment was dismissed by the Government and the indictment on which the case was tried was returned on November 12, 1969. This indictment was designated as a superseding indictment containing the same charges and adding to them the alleged violations of December 18, 1968. Petitioner again filed a motion under Rule 16, which was sustained by the Court the day of the commencement of the trial, February 2, 1970. At that time, examination was made by Petitioner's counsel of the exhibits of the Government. Knowledge of the destruction of the fuses and powder was not determined or made known to the defense until brought out by the testimony of Agents Doyle and Anderson during presentation of the Government's case. Throughout the trial the Government used Government's Exhibits 3 and 62, photographs of practice fuses. These were the comingled fuses from the purchases of December 17th and December 18th, 1968, and although not admitted into evidence, these photographs were taken into the jury room during their deliberations.

The intentional destruction of the live portions of the practice fuses and most all the powder precluded the Petitioner from the opportunity to test, examine or view the

items which he was charged to have possessed, transferred or sold in Counts III through XI.

Throughout the trial Treasury Agents testified that it took a joining of the three components—fuse, body and powder—to make what was charged to be a destructive device. The Government's final witness, Captain Michael Kuhns, was qualified by the Government as an expert and his testimony was allowed to stand that a practice fuse alone is a destructive device. Thereafter Petitioner's offer of proof was denied by the trial court, precluding Petitioner from demonstrating to the jury the properties of a practice fuse to clarify the Government's conflicting testimony and to substantiate Petitioner's contention that these items did not constitute a destructive device.

In the Court's instructions the jury was told that, as a basis for conviction under any count (Counts III through XI) of the indictment, it need find that only one grenade was possessed, sold or transferred rather than the number of grenades charged in the count. The Court failed to instruct the jury on Count IV, instructed twice on Count III, failed to instruct on Count X, but did instruct on a previously dismissed count, Count IX.

Petitioner's motion for judgment of acquittal at the close of the Government's case and motion for judgment of acquittal at the conclusion of all of the evidence were denied by the trial court. Petitioner's duly filed motion for arrest of judgment was denied by the trial court.

REASONS FOR GRANTING THE WRIT

ONE AND TWO

The United States Court of Appeals for the Seventh Circuit, in paragraph I of its opinion, discounted all of Petitioner's issues of self-incrimination basing its opinion on an erroneous interpretation of a recent decision of the United States Supreme Court in **United States v. Freed** (39 U.S.L.W. 3424). The Appeals Court stated:

> "The principal thrust of this appeal was that the provisions of the Gun Control Act of 1968 involved in all counts of the indictment, except Counts I and II, unconstitutionally required defendant to incriminate himself. However, prior to the oral argument of the appeal, **United States v. Freed,** ... U.S. ... (39 U.S.L.W. 3424), was decided and held that this statute does not violate the self-incrimination clause of the Fifth Amendment. See also **United States v. McCutcheon,** ... F.2d ... (7th Cir. 1971); **United States v. Lauchli,** ... F.2d ... (7th Cir. 1971). Under these authorities we must reject defendant's contentions with respect to statutory unconstitutionality."

The McCutcheon case and the Lauchli case were decisions of the Seventh Circuit Court of Appeals.

The Freed decision involved the issues of the defendant's having been a transferee and claiming immunity from prosecution because of the self-incrimination demands of the statute "through" the conduit of the transferor. Petitioner was never charged or claimed to have been a "Transferee".

The Government argued and by its evidence attempted to show that Petitioner was a transferor, obtaining at

the instance of two undercover Treasury Agents, Crozier and Thornton, and mostly in their presence, separate components alleged to constitute destructive devices, grenade components. The evidence showed that the practice fuses, powder and practice grenade bodies were obtained from various locations by Petitioner and given to the agents on three separate dates. The Petitioner was shown to be a transferor of these separate items.

The Court of Appeals has misapplied the decision of Freed to Petitioner's issues as the Freed decision dealt only with the issues of self-incrimination by a "transferee". It is contended that a different result would ensue if the Court had not used the Freed decision in its guidelines of review of Petitioner's case.

The constitutionality of the National Firearms Act of 1968 has never been decided as to its effect on a transferor. Petitioner was charged as such and the Government chose to prosecute under certain sections of the statute that were ruled unconstitutional in another district of the United States. **(United States v. Schofer,** 310 F. Supp. 1292 (E.D. N.Y. 1970)) This constitutional question should be decided so that no further conflict can exist in the opinions of the District or Appeals Courts.

In the **Schofer** case, supra, the court held that the accused's Fifth Amendment right not to be required to incriminate himself was a good defense to the charge that he willingly and knowingly transferred a firearm without obtaining a Treasury Department authorization. 26 U.S.C.A. (I.R.C. 1954) Sections 5812, 5861(e). Petitioner relies on this decision (interpreting **Haynes v. United States,** 390 U.S. 85 (1968), **Marchetti v. United States,** 390 U.S. 39 (1968) and **Minor v. United States,** 396 U.S. 87 (1970)) as a complete defense to Counts III, IV, VI, VII and X. The court's interpretation of **Haynes,** *supra* referring to Sections 5851, 5841 and 5861 was never appealed by the Government, and Petitioner contends

such interpretation of the sections involved was correct and is a complete defense to the Petitioner herein for prosecution under those sections of the statute. The court, in the **Schofer** case, stated:

> "**Marchetti, Grosso, Haynes,** and **Leary v. United States,** 1969, 395 U.S. 6, 89 S.Ct. 1932, 23 L.Ed.2d 57, emphasize the Fifth Amendment consequences of the federal practice of making the 'tax' information available to state and federal law enforcement officers both under Section 6107 of the Code (authorizing disclosure of list of certain classes of excise taxpayers) and otherwise. Repeal of Section 6107 shuts off one convenient avenue of disclosure, but it does not appear that there is any effective general restraint on the making available to law enforcement officers of tax information."

> "**Minor v. United States,** 1969, 396 U.S. 87, 90 S.Ct. 284, 24 L.Ed.2d 283, does not deny the defendant the privilege defense in this case, for here the statute, while it is equally unreal if viewed as a statute setting up a scheme of compliance with a real-world counterpart of expectable general compliances, does unequivocally require of the accused a directly self-accusatory filing and specifically punishes the failure to make the filing, for essential elements of the offense charged are the transfer and the transferor's failure to make the filings of Section 5812."

Referring to the "immunity" provisions under Section 5848, the Court in the **Schofer** case stated:

> "But when invoked to validate a statute which requires the transferors of gangster-type weapons to register their transfers, Section 5848 appears inadequate in failing to take account of what was said in **Marchetti** (390 U.S. at 53-54, 88 S.Ct. at 706) about the effect of significant enhancement of 'the likeli-

hood of * * * prosecution for future acts.' The Court explicitly declined to hold that 'the force of the constitutional prohibition' did not extend to a 'confession' of 'purpose' to engage in illegal transactions in the future. The determinate, the Court said, was not 'mere time' but 'the substantiality of the risks of incrimination.' For example, compliance with new Section 5812 might in an indefinable number of cases expose the transferors of such firearms to the charge of acting as accessories to crimes of violence later committed by the transferees."

For the Petitioner to make application for transfer would divulge his intention to make, receive or possess destructive devices, placing Petitioner in the very real and appreciable danger of future prosecution. Further, such application for transfer, and the keeping of records as required under Section 922(b)(5), would also place Petitioner in constant and continual danger of prosecution under the laws of the State of Illinois.

Further conflict arises between the decision of the instant case and that of **Schofer**, *supra*, as to what comprises a "firearm". The **Schofer** case centered on possession by defendant of unassembled materials, dynamite, fuses and blasting caps, which when assembled for detonation had produced what was charged to be a destructive device.

"The statute's terms indicate that it was not intended to reach such ordinary commercial materials through 'intent' alone. The language implies at minimum the presence of parts 'intended' to 'convert' any 'device' into a destructive device akin to those referred to in Section 5845(f)(1) and (2), all of which have definite non-industrial characters. The articles here could be assembled only into the familiar industrial blasting charge; the risk of anti-social use

> here was not inherent in the articles or in any suitability they had for 'conversion' to a non-industrial weapon or 'mine,' but in the **potential perversion** of their use. The potential is rather that of the parked motor vehicle that can be made a lethal weapon by perversion of its purpose. Since the statute is aimed at the kind of evil articles it describes, and **not at evil perversions** of the use of articles of innocent commerce without alteration of their nature or mode of operation, it must be concluded that the articles were not within the statute and that the indictment is ill-founded. In the circumstances it could at best become valid by alleging an intent that is indispensable if the alternative interpretation of the statute is adopted. On that view of the statute, the indictment, Count 1, is invalid on its face'' (Emphasis supplied).

Petitioner contends that such articles as a **practice** fuse, **practice** body and powder possessed by Petitioner were articles which were not within the statute and that the indictment, Counts III through XI was ill-founded. Further, the trial court erred in failing to sustain Petitioner's motion for judgment of acquittal at the close of the Government's case and at the conclusion of all the evidence.

THREE AND FOUR

The United States Court of Appeals for the Seventh Circuit sanctioned the prejudicial proceedings in the trial court which prohibited Petitioner from obtaining a fair trial in violation of his rights to due process under the law. The trial court permitted the Government to completely disregard the usual and accepted rules of procedure before and during the trial so that the effect of the cumulative error completely precluded the Petitioner from receiving a fair trial.

I

The Trial Court Condoned the Government's Disregard of the Court's Own Orders and Refused to Protect Petitioner's Rights.

The Government first returned an indictment against Petitioner on September 25, 1969, alleging certain statutory violations of the National Firearms Act of 1968 on December 17, 1968, February 19, 1969 and April 27, 1969. Petitioner filed a motion to inspect the evidence under Rule 16, which was sustained by the court without setting a particular date or time for such examination (Rule 16(d)). The Government never divulged to Petitioner or his counsel that it had already destroyed portions of the evidence.

Before Petitioner was afforded an opportunity to make the inspection allowed by the Court, the Government dismissed the indictment and filed a superseding indictment, returned November 12, 1969, charging Petitioner with the same statutory violations and adding to them the alleged violations of December 18, 1968. Rather than provide Petitioner or his counsel an opportunity to inspect the evidence under the first indictment, the Government chose to dismiss that indictment and reindict, including the same dates and evidence charged in the original indictment.

The Government destroyed the remaining live portions of the fuses and the greater portion of the powder on October 29, 1969, a date which was, apparently, before the original indictment was dismissed and prior to the return of the superseding indictment. The Government agents admitted that the exhibits were taken to Springfield, Illinois, the residence of one of the attorneys representing Petitioner, and then destroyed on the following day without notifying Petitioner's counsel, depriving Petitioner of his right to view the Government's evidence as ordered by the Court.

Subsequent to the return of the superseding indictment,

Petitioner again filed a motion under Rule 16 to inspect the Government's evidence. This was sustained by the Court the day trial commenced, February 2, 1970, at which time Petitioner's counsel was given the opportunity to view the exhibits brought into court by the Government. Again the Government, during this examination, failed to advise counsel that a major portion of the evidence had already been destroyed, nor did it provide any reports indicating the experimentation or testing of the components (Rule 16(a)(2)) prior to their destruction.

The trial court voiced tacit approval of the Government's violations of Rule 16 by allowing the repeated and continual use by the Government of portions of exhibits and the subsequent use of Government's marked Exhibits 3 and 62, which were photographs of practice fuses admittedly taken prior to the destruction of such exhibits.

In violation of Rule 16(g) the Government was permitted by the trial court to produce witnesses who testified to the experimentation and ultimate destruction of the major portion of the evidence, when no reports or information of such were previously made available to Petitioner under Rule 16. It was not until the second week of trial, during the testimony of Sidney Anderson, the Treasury Agent who was Supervisor on the case, that Petitioner, through this testimony, learned of the experiments and destruction of the additional evidence and exhibits on October 29, 1969 in violation of the Court's ruling.

Thus, the Petitioner was, in effect, denied the right to view the Government's evidence (Rule 16(a) and (b)) although the trial court twice sustained Petitioner's motions to do so. Further, the trial court itself, in sustaining Petitioner's motions, failed to specify a time and place for Petitioner to make such inspection (Rule 16(d)). Finally, when it became evident during the trial that

the Government had failed to comply with the Court's ruling on Petitioner's motions, the trial court neglected to prohibit the Government from introducing the evidence not disclosed or to take any steps (Rule 16(g)) to protect Petitioner's rights.

II

The Trial Court Permitted Violation of the Primary or Best Evidence Rule.

The Seventh Circuit held that the Government's action in this case was "deplorable" and "without justification."

> "Defendant complains that the Government wrongfully disposed of certain evidence before trial, depriving him of his right to view the evidence against him. The initial destruction was on February 5, 1969, before the original indictment of September 25, 1969. The other destruction was on October 27 (sic), 1969, before the superseding indictment of November 12, 1969. On these respective occasions the Government destroyed the fuses and the greater portion of powder obtained from the Defendant in December 1968 and April 1969. The second destruction occurred after the court had granted the defendant's motion to inspect the evidence relating to the prior indictment, but apparently the Treasury agents were unaware of that order. The Government urges that each pre-indictment destruction was necessary in order to protect public buildings.
>
> "It is indeed unfortunate that government agents destroyed tangible evidence material to a pending criminal prosecution. This Court sees no reason why the Government did not find safe storage facilities for preservation of such evidence. It is all the more **deplorable** that the agents accomplished their mission

> apparently without previously notifying either the prosecutor or the district court of their impending actions. Such a lack of communication is **without justification.** Cf. **United States v. Perlman,** 430 F.2d 22 (7th Cir. 1970), certiorari denied 400 U.S. 832" **(Seventh Circuit Opinion, pp. 2-3).** (Emphasis supplied.)

This is in keeping with earlier decisions of this circuit and throughout the Federal system. It is error to allow secondary evidence if the primary or best evidence was or should have been made available. **U. S. v. Rohalla,** 369 F.2d 229 (7 Cir. 1966). In a recent case the Second Circuit Court of Appeals traced this rule in the Federal Courts.

> "The accuracy of the transcript presents a best evidence question. We recently said in **Knohl,** 'as far as the best evidence rule is concerned, a well recognized exception is that secondary evidence may be admitted in lieu of the original provided the original has not been lost, destroyed or become unavailable through the fault of the proponent and provided the copy does not otherwise appear to be untrustworthy'" (**U. S. v. Maxwell,** 382 F.2d 437, 442 (2 Cir. 67)).

In addition to stating the general rule the above opinion set forth all the major exceptions to this rule in a definitive footnote.

> "McCormick, Evidence 196 (1954) (serious fault of the proponent); **Tallo v. United States,** 344 F.2d 467, 470 (1st Cir. 1965) (wrongful disposition); **Chandler v. United States,** 318 F.2d 356 (10th Cir. 1963) (Fraudulent purpose involved in the destruction); **Toho Busson Kaisha, Ltd. v. American President Lines,** 265 F.2d 418, 423. 76 A.L.R.2d 1344 (2d Cir. 1956) (destroyed * * * with fraudulent design);

Watson v. United States, 224 F.2d 910, 912 (5th Cir. 1955) (without any fraudulent purpose or any intent to create an excuse for its nonproduction); **Reynolds v. Denver & Rio Grande Western R.R.**, 174 F.2d 673, 675 (10th Cir. 1949) (Fraud or bad faith with regard to the destruction);

"McCormick, Evidence 206 (1954) at 414 (if the original document has been destroyed by the person who offers evidence of its contents, the evidence is not admissible unless such person, by showing that such destruction was accidental or was done in good faith without intention to prevent its use as evidence, rebuts to the satisfaction of the trial judge, any inference of fraud);" (**Maxwell**, *supra* at p. 442, footnote 3).

The only excuse offered for such action was incredible to the point of being ludicrous. The opinion states (p. 27) that the defendant fails to demonstrate prejudice by the acts of these Treasury Agents in destroying evidence in this case, and dignifies such conclusion by stating that the act is understandably done to insure the safety of a public building. It seems odd that the Government had such concern for the safety of a public building in Illinois, but no such interest in the public building in Missouri where the items were stored in lockers and desk drawers for a period of six months without any apparent danger.

The opinion presupposes the ultimate factual issue: that the components sold were destructive devices as defined by statute. This was the same error complained of in the trial court. From the outset the defendant claimed the component parts, **even if assembled**, could not constitute a destructive weapon. This was a basis for defendant's Motion for Discovery and Inspection (A. 14). The defendant was denied the basic right to examine physical evidence in preparation for trial. By reason of the foregoing

the defendant was unable to produce either expert testimony or demonstrate that these components were not destructive devices. However, this court's opinion concludes:

> "Furthermore, the jury was entitled to believe an Army ordinance officer's testimony that the grenade shells, fuses, and powder sold by defendant to the Treasury agents were, when assembled, capable of being used for destructive purposes" (Seventh Circuit Opinion, p. 5).

If the jury was entitled to accept an Army Ordinance officer's conclusion, it was equally entitled to decide the foregoing items were not capable of being used for destructive purposes, or that the Government had failed to prove this issue beyond a reasonable doubt. The defendant was completely frustrated in establishing his factual defense both in preparation and during trial.

Despite the foregoing, the Seventh Circuit Decision concluded:

> "There was no hint of bad faith or deliberate suppression of evidence which might reasonably have exculpatory value to defendant. Moreover, the live fuses and cans of powder were photographed. The residue of the detonated fuses, samples from each container of powder, and the photographs were all made available to defense counsel. Defendant has pointed to no concrete area of prejudice due to the disposition of these articles. We cannot infer such prejudice from this record" (Seventh Circuit Opinion, p. 3).

Even in civil cases where error is shown to exist, it is the party committing error that has the burden of establishing that it is harmless and caused no prejudice.

> "Where error is shown to exist, it will compel reversal unless the record affirmatively shows that the

> error was not prejudicial. **Duffy v. Cortesi**, 2 Ill.2d 511, 517, 119 N.E.2d 241; **Shore v. Turman**, 63 Ill.App. 2d 315, 323, 210 N.E.2d 232. In our opinion the record does not affirmatively show that the exclusion of the speed of defendant's car from the evidence was not prejudicial."

In Federal Courts the "harmless error" doctrine has a more limited application in criminal cases.

> "The harmless error rule has restricted applicability in criminal cases. Since the defendant holds a carefully guarded right to have his guilt adjudged by the jury, an appellate court should be slow to assume that an error in the trial was inconsequential" (**Deluna v. United States**, 308 F.2d 140, 1 A.L.R. 3rd 969, 986).

The trial court further sanctioned the Government's destruction of the evidence and allowed secondary evidence, at best, to be used when, throughout the trial and over Petitioner's objections, it allowed the testimony of each of the Treasury Agents regarding "co-mingled" fuses and bodies of alleged purchases from Petitioner on two separate dates, December 17th and December 18th, 1968. Two photographs (Exhibits 3 and 62) were marked and identified using this testimony as the basis for their attempted introduction, although such photographs were of co-mingled" exhibits and only the "same as or similar to" those received from Petitioner.

III

The Seventh Circuit Sanctioned the Trial Court's Refusal to Allow Petitioner's Offer of Proof Relating to a Demonstration to the Jury.

Petitioner claims that the refusal of the demonstration of the properties of a practice fuse materially affected the outcome of the trial inamuch as throughout the trial

Treasury Agents testified that it took a joining of the three components—fuse, body and sufficient powder—to make what was charged to be a destructive device, grenade. The Government's final witness, Army Captain Michael Kuhns, after being qualified by the Government as an expert, contradicted not only the agents' prior testimony but also the statute (5845(a)(3), 26 U.S.C.); and, over Petitioner's objection, his testimony was allowed to stand that a practice fuse alone is a destructive device.

It was immediately thereafter that Petitioner's offer of proof was made to demonstrate to the jury, at any location or time set by the Court, the physical properties, if any, of a practice fuse which was then in the courtroom in the hands of defense counsel. This offer of proof was denied by the trial court (Tr. 624). This fuse was one of several practice fuses previously marked for identification purposes as Defendant's Exhibits and which were identified by the Government's witnesses as being the "same as or similar to" those they had destroyed. The court had previously allowed identification of photographs of fuses as being "the same as or similar to" those obtained from Petitioner and destroyed. Inasmuch as Petitioner's marked exhibits were identically identified, refusal by the court of the demonstration precluded Petitioner from substantiating its continuing claim that these items did not constitute a destructive device.

The importance of this demonstration to the jury is further stressed inasmuch as the Government had previously destroyed all of the live practice fuses. Thus, the only exhibits before the jury which could have substantiated Petitioner's contention in conflict with Captain Kuhn's testimony were those in the hands of Petitioner's counsel. Again, the court presupposed the ultimate factual issue and frustrated the Petitioner's attempts to establish his defense.

IV

The Trial Court's Departure From Proper Evidentiary Procedure in Counts I and II Constituted Plain Error.

The Government admitted that it failed to offer into evidence its marked Exhibit No. 1. This was a small .25 caliber Gradoga pistol, the subject of the alleged sale to Larry Joseph Radford in Counts I and II. The gun, even though not offered or introduced into evidence, went to the jury during their deliberations. A small empty black box, marked ".25 Gradoga" (same as the description of the gun), was never marked or introduced by the government, but it too was given to the jury during their deliberations. Inasmuch as the Government failed to substantiate ownership of such exhibit by the Petitioner, and no opportunity was afforded Petitioner to object to the introduction of the exhibit or the empty box (Rule 51), the delivery of such items to the jury constituted plain error.

The majority rule in Illinois and throughout the United States is that even properly admitted exhibits, when taken to the jury room, carry independent significance disproportionate to their context viewed in the perspective of the entire trial. To allow exhibits not admitted to go to the jury is clear error.

> "Even when properly admitted in evidence, exhibits entrusted to a jury at times give the party producing them such a distinct advantage that this court has held it to be within the discretion of the trial judge to refuse to permit the jury to take them to the jury room. **(People v. Cheney,** 368 Ill. 131, and cases cited.) Where, as in this case, exhibits are not admitted in evidence, it is a well-established rule that it is error to permit the jury to take them to the jury room. **(DeWulf v. Dix,** 110 Iowa 553, 81 N.W. 779;

LaBonty v. Lundgren, 41 Neb. 312, 59 N.W. 904; **Rich v. Hayes**, 97 Me. 293, 54 Atl. 724; **In re Barney's Will**, 71 Vt. 217, 44 Atl. 75; 64 Corpus Juris 1029, and cases cited.)" **(People v. Holcomb**, 370 Ill. 299, 300 (1935)).

This rule has been recently reaffirmed in Illinois at the appellate level. **People v. Krueger**, 39 Ill.2d 407, 241 N.E. 2d 707, 713 (1968). **Gertz v. Bass**, 59 Ill.App.2d 180, 208 N.E.2d 113, 115-117 (1965). In **Gertz** *supra*, the court was concerned about use or **misuse** of a dictionary; in the instant case the jury was given a weapon to deliberate on a charge under the National Firearms Act.

The delivery to the jury for their consideration of an exhibit not received in evidence has always constituted error in Federal Court. **Sawyer v. U.S.**, 112 U.S.App.D.C. 381, 303 F. 2d 392, 395; **U.S. v. Grady**, 185 F.2d 293 (7th Cir. 1950); **U.S. v. Douglas**, 155 F.2d 894, 896 (7th Cir. 1947). In **Douglas**, two affidavits attached to the Information containing proof in support of the charges were given to the jury along with the Information. In a recent Eighth Circuit Opinion, this Court of Appeals held:

> "The government in its brief asserts that no prejudicial error was committed in giving to the jury the transcript of the grand jury testimony, Exhibit D-47, for reasons which we have summarized as follows: (1) The record supports an inference that attorneys for both sides reviewed all exhibits prior to delivery of the exhibits to the jury and hence any error in the delivery of Exhibit D-47 to the jury was waived; (2) Any error committed was induced by defendant's failure to screen exhibits; (3) The trial court's denial of a new trial involved an exercise of discretion and no abuse of discretion is shown; (4) Because of the strong case made by the government defendant could suffer no prejudice.
>
> "We reject all such contentions."

The court then went on to show that the record did not reflect that all exhibits were screened and rejected the contention that the error commited was induced by the failure of the defendant to screen exhibits and in so doing stated, at page 115:

> "We find nothing in the record which supports a conclusion that the court directed counsel to screen all exhibits or that counsel understood to do so."

The court concluded with this specific holding:

> "We hold that prejudicial error was committed in giving the jury Exhibit D-47 which was never introduced nor received in evidence. Such error deprived defendant with a fair trial and requires a reversal and a new trial" (**Osborne v. U.S.**, 351 F.2d 111, 114-119 (8th Cir. 65)).

V

The Trial Court Denied Petitioner the Right to Relevant and Material Information Pertaining to the Grand Jury.

Upon Petitioner's motion, made during the testimony of Treasury Agent Sidney Anderson, the trial court refused to allow Petitioner information regarding the date or dates when the Grand Jury viewed the Government's evidence, or its remnants after destruction by the Government, prior to its return of the superseding indictment. Petitioner was thus thwarted from ascertaining if the Grand Jury viewed the remnants of the destroyed exhibits then being used by Agent Anderson in his testimony before the jury, or viewed the original undestroyed evidence pertaining to Counts X and XI.

The Government admitted that on February 5, 1969, it had destroyed the evidence relating to Counts III through VIII, which had precluded the Grand Jury from viewing

them prior to return of either the original or the superseding indictments. Thus, the validity of the superseding indictment as to Counts X and XI, returned by the Grand Jury on November 12, 1969, is questioned because of the admitted date and circumstances of the destruction of the evidence prior to the return of such indictment.

VI

The Trial Court Did Not Instruct the Jury as to the Offenses Charged in the Indictment.

Petitioner was charged and based his defense on the counts in the second and superseding indictment. The Government's first indictment had charged Petitioner with violations on certain dates by possession, sale or transfer of one grenade (three components needed). The Government then filed its superseding indictment and Petitioner defendant on these charges of possession, sale or transfer of ten or nine grenades, depending on the count (Thirty or twenty-seven separate components needed). The destruction of the exhibits precluded Petitioner's showing that the superseding indictment was untenable.

The trial court, after allowing the Government's witnesses for two weeks to attempt to prove what it alleged in the second or superseding indictment, and after the Government's failure to so prove this, then instructed the jury, over Petitioner's objections on what was charged in the first indictment (one grenade, or three components).

The Government's proof had to show sufficient powder in combination with live fuses and bodies to make ten or nine grenades, depending on the count charged. The trial court's instructions in variance with the indictment would not have been so prejudicially erroneous if three separate components were not involved in the making

of each grenade. However, based on the number of separate components needed to prove each count, the Petitioner was deprived of his right to a fair trial by the court's instructions which were given in variance to the second or superseding indictment.

Further, Petitioner invokes this Court's review of the conviction on the grounds of plain error in the trial court's giving of repeated and erroneous instructions (Rule 52(b), Federal Rules of Criminal Procedure). The errors of the trial court in this respect were not brought to its attention until the filing of Petitioner's Motion for New Trial, but it is contended that the errors of the Court in the following instructions were so plain that they constitute a complete judicial disregard for Petitioner's right to a fair trial.

The trial court, having been requested by the Government to instruct individually on each of the remaining ten counts of the superseding indictment, utilized, of the 35 instructions given to the jury, 10 main instructions. The court failed to instruct as to Counts IV and X. The court instructed twice on Count III. The court instructed on Count IX which was dismissed by the Government before the trial commenced.

Petitioner contends that the cumulative effect of the voluminous errors in the instructions was to nullify all of the effect and the guidelines needed in the court instructions for the jury's proper interpretation of the complicated questions involved in each of these counts. The Court's failure to provide such guidelines to the jury and to properly instruct was error of such serious character that it constituted plain error under Rule 52(b) and prohibited Petitioner from obtaining a fair trial.

CONCLUSION

For the reasons stated herein we respectfully submit that the Petition should be granted.

Respectfully submitted

DAVID C. GODFREY
101 South Meramec, Suite No. 1
Clayton, Missouri 63105
(314) 721-3383
Attorney for Petitioner

C. JOSEPH CAVANAGH
First National Bank Building
Springfield, Illinois 62701

and

THOMAS F. LONDRIGAN
916 Ridgely Building
Springfield, Illinois 62701
Of Counsel

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18793

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD EDWARD SHAFER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

JULY 12, 1971

Before KNOCH, *Senior Circuit Judge,* CUMMINGS, and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Defendant was charged in an 11-count indictment with various violations of the Gun Control Act of 1968 (82 Stat. 1213), amending the National Firearms Act. Count IX of the indictment was dismissed at the request of the Government. A jury found defendant guilty on the ten remaining counts, and he was sentenced to a total of ten years' imprisonment.[1]

[1] Five-year concurrent sentences were imposed on Counts I, II, III and VI, and ten-year concurrent sentences were imposed on Counts IV, V, VII, VIII, X, and XI. The sentences on Counts I, II, III, and VI were to run concurrently with the sentences on Counts IV, V, VII, VIII, X, and XI, resulting in a total sentence of ten years.

The first two counts alleged that defendant sold a Gradoga pistol to Larry Radford, knowing that he was a convicted felon and did not reside in Illinois, thus violating 18 U.S.C. Sections 922(d) and 922(b)(3).

Counts III and VI charged that on two different occasions defendant sold ten grenades without keeping the records required by 18 U.S.C. Section 922(b)(5).

The remaining counts charged that defendant transferred certain grenades without filing the required application with the Secretary of the Treasury, in violation of 26 U.S.C. Section 5861(e), and that he possessed unregistered grenades in violation of 26 U.S.C. Section 5861(d).

I

The principal thrust of this appeal was that the provisions of the Gun Control Act of 1968 involved in all counts of the indictment, except Counts I and II, unconstitutionally required defendant to incriminate himself. However, prior to the oral argument of the appeal, *United States* v. *Freed*, ... U.S. .... (39 U.S.L.W. 3424), was decided and held that this statute does not violate the self-incrimination clause of the Fifth Amendment. See also *United States* v. *McCutcheon*, ... F.2d .... (7th Cir. 1971); *United States* v. *Lauchli*, ... F.2d .... (7th Cir. 1971). Under these authorities we must reject defendant's contentions with respect to statutory unconstitutionality.[2]

---

[2] Defendant seemingly also argues that the possession of unregistered firearms counts (V, VIII, and XI) do not state offenses separate from the transfer counts. Being unwilling to depart from *Blockburger* v. *United States*, 284 U.S. 299, we have recently rejected similar arguments. *United States* v. *Lauchli*, ... F.2d ... (7th Cir. 1971); *Lauchli* v. *United States*, No. 17997 (unreported order of June 3, 1970) (7th Cir.).

II

Defendant complains that the Government wrongfully disposed of certain evidence before trial, depriving him of his right to view the evidence against him. The initial destruction was on February 5, 1969, before the original indictment of September 25, 1969. The other destruction was on October 27, 1969, before the superseding indictment of November 12, 1969. On these respective occasions the Government destroyed the fuses and the greater portion of powder obtained from defendant in December 1968 and April 1969. The second destruction occurred after the court had granted the defendant's motion to inspect the evidence relating to the prior indictment, but apparently the Treasury agents were unaware of that order. The Government urges that each pre-indictment destruction was necessary in order to protect public buildings.

It is indeed unfortunate that government agents destroyed tangible evidence material to a pending criminal prosecution. This Court sees no reason why the Government did not find safe storage facilities for preservation of such evidence. It is all the more deplorable that the agents accomplished their mission apparently without previously notifying either the prosecutor or the district court of their impending action. Such a lack of communication is without justification. Cf. *United States v. Perlman*, 430 F.2d 22 (7th Cir. 1970), certiorari denied, 400 U.S. 832.

Nevertheless, we do not believe the destruction of the fuses and powder calls for reversal of this conviction. There was no hint of bad faith or deliberate suppression of evidence which might reasonably have exculpatory value to defendant. Moreover, the live fuses and cans of powder were photographed. The residue of the detonated fuses, samples from each container of powder,

and the photographs were all made available to defense counsel. Defendant has pointed to no concrete area of prejudice due to the disposition of these articles. We cannot infer such prejudice from this record.

III

Defendant next submits that four items not received into evidence were given to the jury for use in its deliberations, thus calling for reversal and remand with respect to Counts I through VIII.

Two of these items, concerning Counts III through VIII, were large photographs showing commingled fuses obtained from defendant. Our study of the transcript, however, shows that they had been admitted into evidence subject to cross-examination by defense counsel. We find no error in the submission of these exhibits to the jury during its deliberations. See *Rice v. United States*, 411 F.2d 485 (8th Cir. 1969); *McCormick on Evidence*, §§ 181, 184 (1954).

The remaining items referred to by defendant were a Gradoga pistol and its black container, relating to Counts I and II. The record reveals that the pistol, marked as Government exhibit 1, was identified by both its purchaser, Radford, and the FBI agent who took custody of the weapon. A proper foundation for admission of the gun into evidence was laid, and the witnesses were subjected to cross-examination concerning its purchase. Inadvertently, however, the Government failed to make a formal introduction of the exhibit, and the record is confused as to whether the judge and counsel in fact understood the pistol as having been offered and received into evidence. Defendant now contends that the Government's proof under Counts I and II must fail without the weapon, and that the delivery of the weapon and container to the jury under these circumstances constituted reversible error. We disagree.

Proof of the unlawful sale of the firearm to Radford was sufficiently established through the testimony of the various government witnesses, including the purchaser himself. Cf. *United States v. Liles*, 432 F.2d 18, 19-20 (9th Cir. 1970). Nor in this case did reversible error arise from the submission of the exhibit and container to the jury. In *United States v. Ackerman*, 393 F.2d 121, 123 (7th Cir. 1968), this Court affirmed a conviction for interstate transportation of a forged security where the instrument itself inadvertently was not introduced into evidence but was nevertheless sent into the jury room during deliberations. As in *Ackerman*, the exhibit in the instant case was identified by witnesses who were then cross-examined concerning the weapon. Moreover, defendant has pointed to no true prejudice arising from the erroneous delivery of the pistol and container to the jury. We therefore hold the error harmless.[3] Cf. *Sawyer v. United States*, 303 F.2d 392, 395 (D.C. Cir. 1962), certiorari denied, 371 U.S. 879; *United States v. Yoppolo*, 435 F.2d 625, 627 (6th Cir. 1970); *United States v. Warner*, 428 F.2d 730, 737 (8th Cir. 1970), certiorari denied, 400 U.S. 930.

IV

As to Counts I and II, defendant asserts that the Government did not prove Radford had been convicted of a crime punishable by a term exceeding one year and that he was a nonresident of Illinois, on the ground that documentary proof was not adduced to this effect. However, Radford's testimony was clear that he had given defendant this information, and the jury was entitled to credit his testimony without the necessity of considering corroborative documentary proof. Cf. *Kenner v. Commissioner*, ... F.2d .... (7th Cir. 1971).

---

[3] At oral argument, defense counsel conceded that if it was permissible to exhibit the pistol to the jury, there would be no error in permitting it to view the container.

V

All counts except the first two involve grenades. Defendant argues that since the grenades in question were disassembled, they were not "firearms" as defined in the statute.

Section 5845(a)(8) of Title 26 defines a "firearm" as "a destructive device." In turn, Section 5845(f) defines a "destructive device" as any "grenade" and "any combination of parts either designed or intended for use in converting a device into a destructive device * * * and from which a destructive device may be readily assembled." We agree with the Government that the grenade shells, fuses, and powder here may be considered such a firearm, even though disassembled. See *United States* v. *Lauchli*, 371 F.2d 303, 312-313 (7th Cir. 1966). The statute does not specify that the parts must be assembled before it applies. To place such a construction upon the language of the Act would contradict the flexibility expressly created by Section 5845(f) and would foster easy evasion to thwart the Congressional intent. We hold that in context with the phrase "and from which a destructive device may be readily assembled," the phrase "combination of parts" is not limited to a pre-existing union of parts but includes an association of the components of a destructive device. Furthermore, the jury was entitled to believe an Army ordnance officer's testimony that the grenade shells, fuses, and powder sold by defendant to the Treasury agents were, when assembled, capable of being used for destructive purposes. Each of the fuse assemblies purchased from defendant exploded when detonated under his supervision, and all the powder (except the samples) purchased from defendant burned when ignited. Because of the possibility of damage, the district court was entitled to refuse the live demonstration proffered by defense counsel.

VI

Lastly, defendant criticizes certain instructions that were given by the trial judge. In particular, defendant objects to the reference that under certain counts of the indictment the Government must prove that defendant knowingly sold or possessed "at least one (1) grenade," whereas the indictment counts dealing with December 1968 refer to ten grenades and the counts dealing with April 1969 refer to nine grenades. The district court overruled this objection on the ground that the Gun Control Act of 1968 would be violated if defendant possessed or transferred a single destructive device. Since this was a correct statement of this element of the crime, the instructions given were proper.

With respect to the remaining criticisms of other instructions, defendant did not present any such objections to the district court, as required by Rule 30 of the Federal Rules of Criminal Procedure. It is now too late to assign such error.

The judgment of conviction is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 18,793

United States of America,
Plaintiff-Appellee,

v.

Ronald Edward Shafer,
Defendant-Appellant.

Appeal From the United States District Court
Southern District of Illinois, Southern Division
Honorable Omer Poos, Judge Presiding

PETITION FOR REHEARING

Defendant-appellant respectfully requests a rehearing in this cause, in that the court misapprehended and overlooked the following:

I

The Court Misapprehended the Applicability of the Freed Decision to the Constitutional Issue Presented in This Appeal.

II

The Court Overlooked the Obvious Prejudice to Defendant in the Destruction of Evidence and Denial of an Offer of Proof to Establish His Defense That the Items Transferred Were Not Capable of Being Used as a Destructive Device.

ARGUMENT

I

The Court Misapprehended the Applicability of the Freed Decision to the Constitutional Issue Presented in This Appeal.

The opinion summarily dismissed the constitutional question in assuming that the decision in **U. S. v. Freed**, ... U.S. ... (39 U.S. LW 3424)[1], determined this issue. The constitutional issue presented in this appeal was not decided in **Freed**. The defendant was aware of the issues presented in **Freed**. In fact the defendant filed a motion and affidavit in order that the issues raised in **Freed** could be examined before filing his brief with this court.

> "That the major constitutional issue in this appeal is now pending before the United States Supreme Court on direct appeal by the Government from the District Court for the Central District of California. (**United States of America v. Donald Freed and Shirley Jean Sutherland**, No. 345, October Term, 1970.)
>
> "That affiant has a copy of the Brief and Jurisdictional Statement of the Government in the above case from the Clerk of the U. S. Supreme Court and the **Questions Presented** are:

---

[1] (39 U.S. LW 4424).

> " '1. Whether 26 U.S.C. (Supp. IV) 5861 (d), which proscribed the possession by an individual of a firearm not registered to him, impermissibly compels an accused to incriminate himself.
>
> "2. Whether 26 U.S. (Supp. IV) 5861 (d) requires allegation and proof that a **transferee** of an unregistered firearm knew and intended at the time of transfer that the firearm which he possessed was not registered to himself, and, if not, whether the provision is unconstitutional.' "

(Affidavit of Thomas F. Londrigan, p. 1.) (Emphasis added.)

The Government's Brief and Jurisdictional Statement referred to in defendant's motion and affidavit related to the duty of a "**transferee**".

> "This statutory scheme is thus entirely different from that which this Court held invalid in **Haynes v. United States**, 390 U.S. 85. The registration requirement in that statute was continuing, and this Court viewed it as 'directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions * * *.' *Id.* at 96. It remained possible to comply with the federal registration provision at all times, but only at the risk of implicating oneself under another state or federal law. This statute was passed to eliminate that fault. H. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 3 U.S.C. Cong. & Adm. News 4426, 4435 (1968). **The only point at which it imposes any duty on a transferee is at the point of transfer**, and the duty at that point is to refuse to take possession of the firearm unless and until the Secretary has approved the transfer. 26 U.S.C. 5812 (b). That duty gives no offense to the Fifth Amend-

ment's privilege against self-incrimination." (**U.S. v. Freed**, Jurisdictional Statement, p. 78.) (Emphasis added.)

The decision by the Supreme Court turned on the issue of the substantial danger to a **transferee, not a transferor.**

> "**The transferor—not the transferee—makes any incriminating statements.** True, the transferee, if he wants the firearm, must cooperate to the extent of supplying fingerprints and photograph. But the information he supplies makes him the lawful, not the unlawful, possessor of the firearm. Indeed the only transferees who may lawfully receive a firearm are those who have not committed crimes in the past. The argument, however, is that furnishing the photograph and fingerprints will incriminate the transferee in the future. But the claimant is not confronted by 'substantial and "real"' but merely 'trifling or imaginary hazards of incrimination'—**first** by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and **second** by reason of the unavailability of the registration data, as a matter of administration, to local, state and other federal agencies. **Marchetti v. United States**, *supra*, 53-54. Cf. **Minor v. United States**, 396 U.S. 87, 94." (**U.S. v. Freed**, *supra*, p. 4425.)

This danger to the **transferor** is neither "trifling or imaginary" such as fingerprints, photographs and the threat of future prosecution. The danger to the transferor is immediate and substantial, in that it requires him to document activity which violates state criminal statutes. The fact that this evidence is not available to local authorities "as a matter of practice", and that 26 U.S.C. § 5848 provides such information cannot be used as evidence with respect to prior or concurrent violations, does not provide immunity as complete as the jeopardy

it creates. Such a "safeguard" winks at the obvious self-indicting aspects of a **transferor** attempting to comply with the admittedly incriminating disclosures required by this Act.

The defendant did not argue that the statute was unconstitutional *per se*; or that it infringed on the constitutional rights of a **transferee.** He argued that these requirements violated the constitutional rights of a **transferor.**

> "In **Haynes** the court was concerned that registration requirements of the Old Act were placed with the **transferee.** This is understandable since the defendant, Haynes, was a transferee and asserted the constitutional issue in that capacity. In **Haynes,** the transferee was obligated to reveal the fact of his unlawful possession of a weapon. In attempting to eliminate this objection, the Congress shifted the entire responsibility for registration and reporting to the **transferor.** Accompanying this statutory responsibility has come the very real and appreciable danger of requiring the **transferor** to report activity (possession, sale or transfer) which is a violation of the criminal laws of the State of Illinois, and therefore incriminatory by the very nature of the disclosure." (Def. Brief, p. 14) (Emphasis added.)

Neither the Supreme Court in **Freed**, nor this court in its opinion has resolved this issue.

If this was this court's intention, this decision must stand on its own interpretation of this statute, it cannot rely upon either the holding or the rationale of **Freed.**

II

The Court Overlooked the Obvious Prejudice to Defendant in the Destruction of Evidence and Denial of an Offer of Proof to Establish His Defense That the Items Transferred Were Not Capable of Being Used as a Destructive Device.

> "Defendant has pointed to no concrete area of prejudice due to the disposition of these articles. We cannot infer such prejudice from this record" (Opinion, p. 3).

The opinion presupposes the ultimate factual issue; that the components sold were destructive devices as defined by statute. This was the same error complained of in the trial court. From the outset the defendant claimed the component parts, **even if assembled,** could not constitute a destructive weapon. This was the basis for defendant's Motion for Discovery and Inspection (A. 14). The defendant was denied the basic right to examine physical evidence in preparation for trial. By reason of the foregoing the defendant was unable to produce either expert testimony or demonstrate that these components were not destructive devices. However, this court's opinion concludes:

> "Furthermore, the jury was entitled to believe an Army ordnance officer's testimony that the grenade shells, fuses, and powder sold by defendant to the Treasury agents were, when assembled, capable of being used for destructive purposes" (Opinion, p. 5).

If the jury was entitled to an Army ordnance officer's conclusion, it was equally entitled to decide the foregoing items were incapable of being used for destructive purposes, or that the Government had failed to prove this issue beyond a reasonable doubt. The defendant was completely frustrated in establishing his factual defense both in preparation and during trial.

To compound the prejudice of the destruction of evidence, the trial court denied defendant the opportunity to demonstrate the characteristics of the component parts, and accepted as **fact** the unsubstantiated **opinion** of government witness, Capt. Kuhn. While Capt. Kuhn's **opinion** may have been admissible, its weight would have been considerably diminished if his unsubstantiated conclusions could have been factually demonstrated as false.

The offer of proof was made in good faith outside the presence of the jury. It cannot be regarded as facetious or a grandstand play. Defendant's counsel cannot be presumed to be risking life, limb and professional reputation merely to alarm the court. Since defendant's counsel were denied their offer, it must be presumed that the suggested demonstration would establish the fact sought to be proved. If such was the case, the defendant was substantially prejudiced in presentation of his defense.

For the reasons stated, the defendant respectfully requests this court grant a rehearing in this cause.

Respectfully submitted

DAVID C. GODFREY
101 South Meramec, Suite One
Clayton, Missouri

C. JOSEPH CAVANAGH
716 First National Bank Building
Springfield, Illinois 62701

THOMAS F. LONDRIGAN
916 Ridgely Building
Springfield, Illinois 62701
Attorneys for Defendant-Appellant

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Friday, August 20, 1971

Before

Hon. Win G. Knoch, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge

United States of America, Plaintiff-Appellee, No. 18,793. vs. Ronald Edward Shafer, Defendant-Appellant.	Appeal From the United States District Court for the Southern District of Illinois, Southern Division.

It Is Ordered by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-391

RONALD EDWARD SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted on ten counts of an eleven-count indictment—count nine was dismissed on the government's motion—charging violations of the National Firearms Act and the Gun Control Act. Counts I and II charged that petitioner, who was a licensed firearms dealer in Illinois, sold a pistol to a man known to him to be a convicted felon and not a resi-

dent of the state of Illinois in violation of 18 U.S.C. 922(b)(3) and 922(d)(1). Counts III and VI charged that on two occasions petitioner sold hand grenades without keeping the required records in violation of 18 U.S.C. 922(b)(5). Counts V, VIII, and XI charged that petitioner possessed unregistered hand grenades in violation of 26 U.S.C. 5861(d), and Counts IV, VII, and X charged that petitioner transferred hand grenades without filing the required application in violation of 26 U.S.C. 5861(e). He was sentenced to five years' imprisonment on each of Counts I, II, III, and VI (the Title 18 counts) and ten years' imprisonment on each of Counts IV, V, VII, VIII, X and XI (the Title 26 counts). All of the sentences were made to run concurrently. The court of appeals affirmed (Pet. App. A).

Petitioner principally contends that his conviction on each count except I and II is invalid because compliance with statutory registration and filing requirements would have required him to incriminate himself under the Fifth Amendment. This Court, however, held in *United States* v. *Freed*, 401 U.S. 601, that 26 U.S.C. 5861(d) does not violate the Fifth Amendment as to a possessor or transferee of firearms. Three of the counts on which petitioner received ten-year sentences (V, VIII, and XI) charged him with possession under Section 5861(d); hence they were valid under *Freed*. Petitioner argues that *Freed* does not apply to the three counts under 26 U.S.C. 5861(e) in which he was convicted as a transferor. There is no need to consider this claim since

petitioner's sentence is fully supported by the Section 5861(d) counts. *Benton* v. *Maryland*, 395 U.S. 784. In any event, it is our position that the use immunity provision of 26 U.S.C. 5848 and the government's policy of non-disclosure outlined in *Freed* (401 U.S. at 605-606) provide adequate protection to the transferor as well as the transferee. Cf. Memorandum for the United States in Opposition in *Lauchli* v. *United States*, No. 71-5064 this Term, a copy of which we are sending to petitioner.[1] Moreover, only lawful transactions require compliance with the registration provisions of the Act (26 U.S.C. 5812) thus precluding any claim of self-incrimination by an illegal transferor.

Since the sentence under any one of the Title 26 counts discussed above is sufficient to support the total ten-year sentence, there is also no need for the Court to reach the validity of the convictions for unlawful sale of grenades in violation of 18 U.S.C. 922(b)(5) under Counts III and VI. We note, however, that it is the policy of the Department of Justice not to prosecute under 18 U.S.C. 922 for the sale of a "firearm" which also comes within the definition of a "firearm" under Title 26; the policy is to prosecute only under Title 26. Prosecution under Counts III and VI (the Title 18 counts) involving the hand grenades is inconsistent with this govern-

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[1] *United States* v. *Schofer*, 310 F. Supp. 1292 (E.D.N.Y., 1970), cited by petitioner, was based on an erroneous interpretation of the immunity provision of 26 U.S.C. 5848 which has been overruled by this Court's decision in *Freed*.

ment policy since the hand grenades were also the subject of Title 26 counts. In these circumstances, if the Court deems it appropriate to reach Counts III and VI, we would not oppose entry of an order vacating conviction under them. See *Petite* v. *United States*, 361 U.S. 529.

Petitioner's remaining contentions (Pet. Questions 3 and 4, Pet. 17-31) are answered by the opinion of the court of appeals on which we rely (Pet. App. A 3-4, 6-7).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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